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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/803,151	03/18/2004	Richard Martin Alvarez	100719.52887US	5034

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CROWELL & MORING LLP  
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EXAMINER

HYLTON, ROBIN ANNETTE

ART UNIT	PAPER NUMBER
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3781

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Please find below and/or attached an Office communication concerning this application or proceeding.



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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/803,151  
Filing Date: March 18, 2004  
Appellant(s): ALVAREZ, RICHARD MARTIN

**MAILED**  
**NOV 08 2006**  
**Group 3700**

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James F. McKeown  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed August 23, 2006 appealing from the Office action mailed February 16, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

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**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

4,550,546	RALEY et al.	11-1985
3,615,712	KELLER	10-1971
6,342,258	BERINGS et al.	1-2002
4,338,365	RUSSO	7-1982

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 103***

Claim 1 is rejected under 35 U.S.C. 103(a) as being unpatentable over Raley et al (US 4,550,546) in view of Keller (US 3,615,712).

Raley teaches a sanitary and breathable packaging comprising a container (22, 22') having walls of laminate material with at least one insertion opening (any one of sides 24) with a non-reusable (heat-sealed) closure and holes selectively arranged for aeration internally into the packaging. The intermediate packaging of Raley discloses the holes are offset such that internal aeration (forced steam) into the packaging occurs. See Fig. 2 and corresponding column 4, lines 38-43 as well as Fig. 9 and column 5, lines 36-41. Raley does not teach at least one weakening line for tearing the packaging.

Keller teaches it is known to provide a packaging having holes for water and air movement between the bag interior and ambient atmosphere and at least one weakening (15) for extracting contents from the bag.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to apply the teaching of at least one weakening to the packaging of Raley. Doing so allows for easy opening of the packaging for removal of the contents when desired.

**NEW GROUND(S) OF REJECTION**

Claim 1 is rejected under 35 U.S.C. 103(a) as being unpatentable over Berings et al. (US 6,342,258) in view of Russo (US 4,338,365).

Berings discloses a sanitary and breathable packaging for food products comprising a container having walls with at least an insertion opening with a non-reusable closure (2), at least one weakening line (4) for tearing the packaging and extracting contents thereof, and holes (12) selectively arranged around the packaging so as to be suitable in size and number for aeration internally into the packaging. The aeration internally into the packaging is inherent since the

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holes allow for water to enter the interior thereof. Berings does not teach the walls are of laminate material.

Russo teaches it is known to provide a sanitary and breathable packaging for food products comprising a container having walls of laminate material for reheating by submersion in a liquid.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to form the packaging walls of Berings of a laminate material as taught by Russo. Doing so allows for a more durable packaging not subject to the limitations of the prior art as disclosed therein.

#### **(10) Response to Argument**

In response to appellant's argument that Raley's packaging is for a different purpose than the packaging of the instant application, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. The prior art packaging is capable of being used with a food product.

It is to be noted that the structure set forth in the instant claim is not directed to a sealed, or even closed, packaging. Rather, it is directed to a packaging having an insertion opening with a non-reusable closure. To that regard, the packaging is an intermediate packaging. The intermediate packaging of Raley meets the limitations of the claimed instant invention as set forth above.

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on

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obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Appellant argues the combination of Raley and Keller involve "impermissible hindsight" because the holes of Keller allegedly do not allow for aeration internally into the packaging. It is submitted that holes large enough for water to pass through are most certainly large enough for air to pass through. Thus, when the packaging is not submersed in water, the holes allow "aeration internally into the packaging".

Lastly, appellant asserts no motivation for combining the prior art teachings of Raley and Keller is set forth in the rejection. Appellant's attention is directed to the last sentence of the last subparagraph of the rejection. It is stated that the application of the weakening line "allows for easy opening of the packaging for removal of the contents when desired". This is the motivation of applying the weakening line of Keller to Raley.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

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This examiner's answer contains a new ground of rejection set forth in section (9) above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.


Respectfully submitted,


Robin Hylton  
Primary Examiner GAU 3781

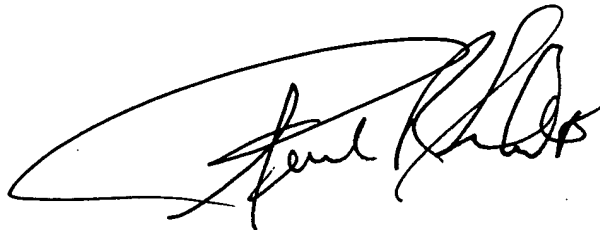
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**A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:**

Conferees:

  
Nathan Newhouse  
SRE GAU 3782

  
Jes Pascua  
Primary Examiner GAU 3782



FREDERICK R. SCHMIDT  
DIRECTOR  
TECHNOLOGY CENTER 3700